No. 82-1474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS AND HAROLD J. WOLFINGER,
Petitioners,

v.

EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATES OF COLORADO, IOWA, MARYLAND, NEW YORK, TENNESSEE, TEXAS AND WISCONSIN IN SUPPORT OF RESPONDENT

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INTEREST OF THE STATES OF COLORADO, IOWA, MARYLAND, NEW YORK, TENNESSEE, TEXAS AND WISCONSIN

The *amici* states have a significant interest in the applicability of the antitrust laws to occupational and professional licensing. Regulation of various professions and occupations though licensure is a traditional exercise of state police power for the protection of the health, welfare and economic well-being of state citizens. In addition, the *amici* states have a significant interest in

preserving the fundamental principles of free competition embodied in federal and state antitrust laws. It is critical to the *amici* states that the tension between these two sometimes conflicting interests be resolved appropriately.

Because of the important public interests served by professional licensing, it is of utmost importance to the states that the integrity of professional and occupational licensing be maintained. At the same time, the *amici* states recognize the significant potential for injury to competition which is inherent in a licensing system which frequently permits members of the regulated profession to perform the licensing and regulatory functions. In order to serve these disparate interests, the *amici* states believe that licensing restrictions imposed by state boards should be strictly limited to the restraints actually authorized by the states' ultimate policy-making authority, so that the public will be protected by the licensing process but at the same time will receive the maximum benefits of free and open competition.

In sum, the *amici* states believe that through considered application of the antitrust laws to occupational and professional licensing and regulation, these dual interests may be served. Proper application of the antitrust laws can ensure that the interest of the states in maintaining free competition among regulated occupations will be preserved without interfering unduly with the states' legitimate interest in regulating professions.

SUMMARY OF ARGUMENT

The court of appeals was correct in holding that the members of the Arizona Committee on Examinations and Admissions ("Bar Examiners") were not exempt from federal antitrust scrutiny when they allegedly imposed an artificial restraint upon admissions to the Arizona bar. The Bar Examiners' alleged manipulation of examination

grades to limit the number of admittees recommended to the state supreme court constitutes a *per se* unreasonable group boycott in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, unless this conduct is exempt under the state action doctrine.

The state's decision to regulate bar admissions standing alone is not sufficient to immunize the anticompetitive restrictions imposed by the Bar Examiners; rather, the Bar Examiners' conduct can be exempt only if it satisfies the test set out in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The *Midcal* test, as developed in recent state action decisions, requires that the challenged restraint must be "clearly articulated and affirmatively expressed as state policy." If the challenged conduct is not specifically authorized by state policy, it may nevetheless satisfy the *Midcal* test if it is clearly necessary to effect state policy regarding competition.

The Bar Examiners' alleged imposition of a *de facto* quota on new bar admissions was not required by nor was it clearly necessary to effect the state supreme court's policy requiring a minimum level of competency to practice law. Consequently, the Bar Examiners are not immune under the state action doctrine from liability for imposing the alleged restraint.

ARGUMENT

This case raises the specific issue of the applicability of the antitrust laws to a *de facto* quota on bar admissions imposed by a committee of Arizona lawyers appointed by the state supreme court.[1] Stated simply, respondent

[1] The Arizona Bar Examiners are appointed by the court from a list of nominees submitted by the State Bar Association. Ariz. Sup. Ct. R. 28(a). All lawyers practicing in Arizona are required to be active members of the State Bar Association. Ariz. Sup. Ct. R. 27(a)(3).

alleges that the Arizona Bar Examiners, by adjusting the raw scores on the bar examination to limit the number of admittees, created an artificial restraint upon competition among members of the Arizona bar. The court of appeals below ruled that the alleged conduct of the Bar Examiners in restricting bar admissions is subject to antitrust scrutiny.

This case also raises broader questions concerning the proper application of the antitrust laws to entry barriers and other trade restraints imposed by state occupational licensing boards.

I. The Anticompetitive Restrictions Imposed By The Arizona Bar Examiners Are Not Automatically Immunized From Antitrust Scrutiny Simply Because The State Has Chosen To Regulate Bar Admissions.

The Bar Examiners' principal argument for immunity is that because the Arizona Supreme Court has chosen to regulate entry to the legal profession any restraint upon admission imposed by them is exempt from antitrust scrutiny under the state action doctrine. This argument is without support in existing case law and is wrong as a matter of federal-state policy.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court considered the applicability of the Sherman Act, 15 U.S.C. §§ 1-7, to state regulation specifically directed by a state legislature. The Court concluded that Congress did not intend "activities directed by [a state's] legislature" to result in liability under the Sherman Act. *Id.* at 350-51. The Court ruled that a regulatory system established by the California Agricultural Probate Act to control the production and marketing of raisins in order to maintain prices at artificial, non-competitive levels was exempt

from federal antitrust challenge. Significantly, the Court based its decision on the concept that the challenged restraint was imposed by the state as sovereign acting through explicit statutory mandate. *Id.* at 352. The Court did not consider whether state officials, acting in the context of a general regulatory scheme but without explicit legislative authority, would be immune from antitrust suit when they imposed trade restraints.

Beginning in 1975, the Court has decided a series of cases in which it has refined and narrowed the doctrine originally expressed in *Parker*.[2] This line of decisions includes cases involving conduct by private parties as well as cases challenging conduct of state agencies and local governments.[3]

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[2] *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[3] Two of the seven cases dealt with the applicability of the state action doctrine to municipalities and other political subdivisions. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Two other cases addressed the state action doctrine in the context of conduct by private parties which was related to a state regulatory scheme. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

In three cases, the Court faced the specific issue of the antitrust liability of state agencies. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the issue was the antitrust exposure of a California board charged with the responsibility of evaluating applications for opening new automobile dealerships. Two other cases determined the application of the state action doctrine to state bar associations which

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court addressed the issue of whether a minimum fee schedule established by the Virginia State Bar was immune under state action. Under the rules of the Virginia Supreme Court, the State Bar, a quasi-state agency, had the responsibility of enforcing disciplinary rules governing members of the bar. Through its enforcement mechanism, the State Bar mandated a minimum fee schedule for legal services. The Court held that enforcement of the fee schedule was not immune because it was imposed by the State Bar and not by the state supreme court. In its decision, the Court explained:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules requires the anticompetitive activities of either respondent. . . . *The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.*

421 U.S. at 790 (emphasis added) (citations and footnote omitted).

Two years later, in another case involving the regulation of Arizona lawyers, the Court applied the same analysis. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In contrast to the situation in *Goldfarb*, the Arizona Supreme Court had adopted a rule prohibiting price advertising by lawyers. The state court had dele-

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had authority under state law for enforcing the rules of professional responsibility for lawyers. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

gated the authority to enforce its rule to the state bar association, also a quasi-state agency. This Court ruled that the state bar's conduct was immune under the state action doctrine because the restraint was adopted not by the state bar but by the state supreme court:

> In the instant case, by contrast [to *Goldfarb*], the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; . . . and, thus, the restraint is "compelled by direction of the State acting as a sovereign."
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>
> . . . The disciplinary rules reflect a clear articulation of the state's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed reexamination by the policymaker — the Arizona Supreme Court — in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

Id. at 359-60, 362 (citations and footnote omitted). The Court concluded that restraints imposed by state agencies must be judged by reference to the authority granted to them by the state's ultimate policymaker.

The principles established in *Goldfarb* and *Bates* were extended to alleged anticompetitive conduct by state political subdivisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The plurality opinion concludes that state agencies and subdivisions were not, "simply by reason of their status as such, exempt from the antitrust laws." *Id.* at 408. Mr. Justice Brennan, writing for the plurality, explained that *Goldfarb* "made it

clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *Id.* at 410. Thus, the *Lafayette* plurality reasoned that to the extent that a local government acts without authorization or direction by the state its actions are similarly not immune. In Justice Brennan's view this limitation on the power of local governments did not prevent them from being effective instrumentalities of state govenment:

> Today's decision does not threaten the legitimate exercise of governmental power. . . . *Parker* and its progeny make clear that a State properly may, as States did in *Parker* and *Bates*, direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. Compare *Bates*, with *Goldfarb*.

Id. at 416-17. The *Lafayette* plurality's reliance on *Bates* and *Goldfarb*, cases involving state agencies, makes clear its view that state agencies and political subdivisions will be treated alike for purposes of the state action doctrine.

In his opinion in *Lafayette*, Justice Brennan also recognized the danger in permitting a local government to impose anticompetitive restraints which may reflect "its own preference, rather than that of the State." *Id.* at 414. Precisely the same danger exists in the case of restraints imposed by state licensing boards. When state board members act without clear statutory authority, their actions may reflect their own private interests rather than the interests of the state.

The position taken by the plurality in *Lafayette* was adopted by six members of the Court in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). Again, the Court emphasized the importance of the language in *Parker* that the challenged restraints had been "directed by [the state's] legislature", *id.* at 54, and that exemption is premised on "Congress' intention to

embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Id.* at 53. *Boulder* made clear that for immunity to attach the subordinate governmental unit must have clear statutory authority to impose an anticompetitive restraint.

The Arizona Bar Examiners in this case do not exercise the full sovereign powers of the State of Arizona over regulation of bar admissions. Indeed, from reviewing the prior decisions of the Court, it is clear that only the Arizona Supreme Court, wielding the "State's power over the practice of law", has the authority to formulate policy in this area. The Bar Examiners are nothing more than the implementers of the policy adopted by the state supreme court.[4] *See Bates*, 433 U.S. at 362. However, the fact that the Bar Examiners implement state policy

[4] It is important, however, to note a distinction between occupational licensing board members and many other state officials. Unlike most government officials, board members are almost never state employees, but serve as volunteers while continuing to practice the profession they regulate. As in this case, see n.1, *supra*, they are very often appointed from a list submitted by their professional association. They are neither politicians nor civil servants, but competitors in the field they regulate. In this respect, they are more like private persons than public officials. Indeed, it is not unreasonable to suggest that their strict enforcement of state law has a personal, anti-competitive motivation rather than an altruistic one. Virtually all commentators on occupational licensing issues have strenuously argued this point. *See, e.g.*, W. Gellhorn, *Individual Freedom and Governmental Restraints*, (1956); W. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 11-12 (1976); Moore, *The Purpose of Licensing*, 4 J.L. & Econ. 93, 93-95 (1961); Shimberg, The Professional and the Public, 1-2 (Nov. 16, 1976), *reprinted in Restrictive and Anticompetitive Practices in the Eyeglass Industry: Hearings Before the Subcomm. on Monopoly and Anticompetitive Activities of the Senate Comm. on Small Business*, 95th Cong., 1st Sess. at 1369-70 (1977) (material submitted for the record by the staff of the Subcommittee) (hereinafter cited as *Eyeglass Hearings*); Sims, State Regulation and the Federal Antitrust Laws: The Justice Department's View of Licensing — An Address before the

regarding bar admissions does not end the inquiry as petitioners suggest.[5] As explained below, the Bar Examiners' conduct must be tested against the authority granted them by the state supreme court to determine whether immunity attaches.

II. The Arizona Bar Examiners' Alleged Manipulation Of Grades To Limit The Number Of Applicants Recommended For Admission To The Bar Was Not Immune.

The first step in analyzing the potential liability of the Bar Examiners is to evaluate the anticompetitive nature of the particular conduct. The basic allegation here is that members of the legal community manipulated the objective grades on the bar exam to limit artificially the number of new competitors admitted to the bar.[6] Respondent alleges that, rather than recommending for admission all bar applicants who achieved an objective grade of 70,

National Council on Occupational Licensing, Inc. (August 4-5, 1975), *reprinted in Eyeglass Hearings* at 1353 (1977) (material submitted for the record by staff of the Subcommittee).

[5] There is some limited authority among the lower federal courts for the position espoused by petitioners. *Llewellyn v. Crothers*, 1983-1 Trade Cas. (CCH) ¶65,358 (D. Ore. 1983); *Deak-Perera Hawaii, Inc. v. Department of Transportation, State of Hawaii*, 553 F. Supp. 976 (D. Hawaii 1983). However, this position is without question the minority view and is not supported by the general principles developed by this Court. In fact, the decision in *Deak-Perera* was expressly rejected by another judge in the same district. *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 562 F. Supp. 712 (D. Hawaii 1983; *see also Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222 (9th Cir. 1982); *United States v. Texas State Board of Public Accountancy*, 592 F.2d 919 (5th Cir. 1979), *aff'g* 464 F. Supp. 400 (W.D. Tex. 1978), *cert. denied*, 444 U.S. 925 (1979).

[6] Because the case has been appealed on a motion to dismiss, the entire record consists of the complaint and answer originally filed by the parties. For this reason, the facts are very sketchy. Nevertheless, because of the procedural status of the case, respondent's allegations must be taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *see also* 2A J. Moore & J. Lucas,

the Bar Examiners manipulated the grades to limit artificially the number of new competitors. Reduced to their simplest terms, respondent's allegations charge a *per se* unreasonable group boycott by members of the established Arizona bar against new admittees in violation of section 1 of the Sherman Act.

There is no question that if a private professional association, rather than a quasi-official agency, had imposed such a restriction, its conduct would clearly violate the antitrust laws.[7] In a case decided last term, the Court ruled that a private trade association violated section 1 of the Sherman Act by allowing one of its members to unreasonably withhold approval of a competitor's product in order to bar it from the marketplace. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

Assuming, as we must, that respondent's factual allegations are true, the Arizona Bar Examiners may escape liability only if the artificial restraint imposed by them is within the protection of the state action doctrine.

A. *Anticompetitive Restrictions Imposed By Subordinate Governmental Entities Must Satisfy The* Midcal *Test.*

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court

Moore's Federal Practice ¶ 12.08 (2d ed. 1982). Obviously, in the event that the decision below is affirmed, the case will be remanded and the factual circumstances can be developed in detail through discovery.

[7] This Court has consistently ruled that activity by a trade or professional association to effect the removal of a certain competitor or competitive product from the market constitutes a *per se* violation of the antitrust laws. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

reviewed its analyses in all the previous state action decisions and spelled out the following test for immunity:

> These decisions established two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105.

Application of the first portion of this test requires two steps. First, the state policy regarding competition must be identified. This requires a determination of which branch of state government wields the state's full sovereign powers over the regulated activity and what policy regarding competition the state has articulated. Then, the challenged restraint must be compared to the identified state policy. If the challenged restraint is "clearly articulated and affirmatively expressed" in the identified state policy, the first portion of the *Midcal* test is satisfied and the subordinate governmental entity imposing the restraint is immunized. The difficulty arises when authorization for the restraint is not clearly articulated and affirmatively expressed. In that case, the competing interests of the state in implementing its regulatory policy and of the federal government in promoting full competition can both be adequately served only by immunizing the subordinate state entity if the restraint it imposes is clearly necessary[8] to effect the

[8] The Court has used various formulations to describe the standard for comparison which should be employed. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 415 ("[W]e agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature *contemplated* the kind of

identified state policy regarding competition.[9]

The second standard for immunity identified in *Midcal* requires that the trade restraint be actively supervised by the state's agents rather than simply turned over to private control. This active supervision requirement recognizes the principle that immunity for private conduct is justified only if the workings of the marketplace are replaced with a state-controlled regulatory system.[10]

In analyzing the *Midcal* standard, it is essential to bear in mind that the state action doctrine represents an exception from the antitrust laws, which have been described as the "Magna Carta of free enterprise . . . [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). An exception to a law which furthers such fundamental principles of our social and economic system should not be lightly extended. *Cantor*, 428 U.S. at 597 and n.37.

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action complained of.'"(emphasis added) (citations omitted)); *Cantor v. Detroit Edison Co.*, 428 U.S. at 597 (the challenged restraint is permitted only to the "minimum extent necessary" in order to make the regulatory act work); *Goldfarb v. Virginia State Bar*, 421 U.S. at 791 ("It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled* by direction of the State acting as a sovereign." (emphasis added)).

[9] If the state legislative scheme expresses no position regarding the restraints to be imposed upon competition and therefore the state's position can be described only as one of "mere neutrality", then the restraint does not meet the first part of the *Midcal* test. *Boulder*, 455 U.S. at 55.

[10] In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Court expressly left open the issue of whether a political subdivision's conduct must be actively supervised by the state in order to be immune from antitrust liability. *Id.* at 51 n.14. The Ninth Circuit in its opinion in this

Lower courts have not applied the *Midcal* test uniformly. Some courts have concluded that the "clearly articulated and affirmatively expressed" standard is satisfied whenever there is a statute which could even arguably support the trade restraint imposed. For example, the Court of Appeals for the Eighth Circuit in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 1983-2 Trade Cas. (CCH) ¶65,575 (8th Cir. 1983), addressed a challenge to a municipality's prohibition of the operation of private landfills. The court found that there was no evidence that the Iowa legislature "actually contemplated that the agency responsible for the construction and operation of the landfill facility would have the exclusive right to dispose of solid waste or would engage in practices in restraint of trade." *Id.* at 68,855. Nevertheless, the court ruled that the local government's monopolization of solid waste facilities was exempt from antitrust scrutiny because of the court's judgment that the restraint was a "'necessary or reasonable consequence' of engaging in the authorized activity [(raising money to fund development of resource recovery facilities)]." *Id.* at 68,857 (citations omitted); *see also Hybud Equipment*

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case implicitly ruled that the active state supervision requirement applied to state agencies as well as private entities. The Seventh and Eighth Circuits have reached the opposite conclusion in cases involving political subdivisions. *Gold Cross Ambulance and Transfer and Standby Service, Inc. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832). Although this issue need not be decided under the facts in this case, the *amici* states believe that the court of appeals below was wrong in concluding that state agencies must be actively supervised by the state's ultimate policy-making authority for immunity to attach. For example, although the active supervision requirement was not fulfilled in *Midcal*, it was clear that the Court intended that the requisite active supervision could be performed by the state agency regulating alcoholic beverages rather than by the California legislature.

Corp. v. City of Akron, 1983-1 Trade Cas. (CCH) ¶65,356 (N.D. Ohio 1983) (decision following remand by Supreme Court, 455 U.S. 931 (1982), which vacated prior court of appeals decision, 654 F.2d 1187 (6th Cir. 1981), for reconsideration in light of *Boulder*).

Other courts have applied the *Midcal* standard more stringently. In a case involving a municipality's alleged participation in a conspiracy to foreclose competition among parking lot operators, the Court of Appeals for the First Circuit stated that "absent explicit language, the political subdivision claiming exemption must illustrate the requisite state legislative intent by demonstrating by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign has established." *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981) (footnote omitted); *see also Ratino v. Medical Service of the District of Columbia*, 1983-2 Trade Cas. (CCH) ¶65,641 (4th Cir. 1983).

The reasoning of the Court in *Boulder* supports the conclusion that the standard should be strictly applied. There the Court ruled that a general grant of home rule powers to Colorado cities was insufficient to establish state action immunity. The Court reasoned that "[a]cceptance of such a proposition — that the general grant of power to enact ordinances necessarily implies the state authorization to enact specific anticompetitive ordinances — would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." 455 U.S. at 56.

This reasoning from *Boulder*, as explained above, applies equally to a subordinate state agency such as the Arizona Committee on Examinations and Admissions. If the "clearly articulated and affirmatively expressed" standard were to be satisfied, as petitioners urge, by any

statement of general policy indicating an intention to regulate a certain profession or industry, the principles of free enterprise embodied in the antitrust laws could be seriously undermined. Consequently, the *amici* states believe that the national policy favoring competition and the states' interest in effective licensing of trades and professions are best served by careful scrutiny of anti-competitive regulatory conduct.

B. *It Is Especially Appropriate That Anticompetitive Restraints Imposed By Occupational Licensing Boards Be Carefully Scrutinized.*

In order to understand fully why careful scrutiny of restraints imposed by state licensing boards is appropriate, it is necessary to examine the reasons for and consequences of occupational licensing. The fundamental rationale for licensing is to protect the public from incompetent and fraudulent practitioners. Because it is assumed that lay people do not have the necessary expertise to evaluate the qualifications of applicants seeking entry to a particular occupation or to assess their competence, a system of self-regulation has evolved.[11] In

[11] One commentator has described the rationale for self-regulation as follows:

> Once the legislature decides to exercise the police power to license the members of a profession, it is logical (on the surface) to transfer the licensing power to those with expertise, the existing members of the profession. The reason for licensing individuals is that the public is ignorant and incapable of judging the qualifications of sellers. The legislature, essentially, is no more qualified to determine competency than is the general public. It is logical to assume that only those already qualified in the profession can judge the competence of others to practice the profession.
>
> Consequently, the majority of licensing boards are composed of active members of the profession being licensed.

Barron, *Business and Professional Licensing — California, A Representative Example*, 18 Stan. L. Rev. 640, 649 (1966).

general, licensing and regulatory boards are made up primarily, if not exclusively, of members of the occupation to be regulated.[12]

The *amici* states recognize that this system of licensing and self-regulation does serve a valid public interest. However, the anticompetitive potential inherent in such a system of regulation is obvious and cannot be disputed.[13] Indeed, many critics have suggested that limiting competition, rather than protecting the public, is all too often the goal of licensing regulatory restrictions.[14] This is an unfortunate, but natural result of a system in which members of the practicing profession control licensing standards and procedures. As one commentator stated:

> Licensing individuals is not done primarily to limit the sellers in an occupation to some arbitrary number, but to insure minimum standards. . . .

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[12] Largely as a result of the increasing concern that licensing boards all too often pursue their own interests rather than those of the public, there has been a movement in recent years to include "consumer members" on boards. However, even where this practice has been adopted, there is generally only one consumer member per board.

[13] A significant body of commentary on the economic implications of occupational licensing has developed. Although the theoreticians do not necessarily agree on the correct analysis or the extent of the economic consequences, there is a consensus that occupational licensing, as it has traditionally been practiced, results in a lessening of competition, and hence in higher prices and perhaps even lower quality. *See, e.g.*, Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975); Clarkson and Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. Miami L. Rev. 77, 79-82 (1980); Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. Rev. 559 (1979); Johnson and Corgel, *Antitrust Immunity and the Economics of Occupational Licensing*, 20 Am. Bus. L.J. 471 (1983); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & Econ. 187 (1977).

[14] *See supra* note 4 and materials cited therein.

> Prostitution of the public interest in the field of individual licensing occurs because the licensing function is transferred to the profession being licensed. . . .
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> . . .[E]ntry requirements are often not for the purpose of protecting the public, but for the purpose of protecting the welfare of the *licensees*.

Barron, *Business and Professional Licensing — California, A Representative Example*, 18 Stan. L. Rev. 640, 649, 654 (1966) (emphasis in original).

To a significant extent, it is the factor of self-regulation, in addition to the assumption accepted for many years that professionals were entitled to a special exemption from antitrust laws,[15] that resulted in many of the traditional limitations on competition among professionals. For example, prohibitions against advertising,[16] prohibitions against competitive bidding,[17] and enforcement of fee schedules[18] are among the

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[15] Despite the Supreme Court's 1943 decision in the criminal antitrust prosecution of the American Medical Association, *American Medical Association v. United States*, 317 U.S. 519 (1943), the misconception that professionals were exempt from the antitrust laws continued to be vigorously asserted. The numerous decisions involving professionals during the last decade should have permanently dispelled that misconception. *American Medical Association v. Federal Trade Commission*, 455 U.S. 676 (1982), *aff'g* 638 F.2d 443 (2d Cir. 1980); *United States v. National Society of Professional Engineers*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[16] *American Medical Association v. Federal Trade Commission*, 455 U.S. 676 (1982), *aff'g* 638 F.2d 443 (2d Cir. 1980); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[17] *United States v. National Society of Professional Engineers*, 435 U.S. 679 (1978); *United States v. Texas State Board of Public Accountancy*, 592 F.2d 919 (5th Cir. 1979), *aff'g* 464 F. Supp. 400 (W.D. Tex. 1978), *cert. denied*, 444 U.S. 925 (1979).

[18] *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

practices which until recently were common among self-regulated professions. The anticompetitive effects of such restraints, often promulgated and enforced by state boards, have been significant.[19] Strict antitrust compliance by occupational licensing and regulatory boards is a vital ingredient in any effort to achieve and maintain a higher level of competition among regulated occupations.[20] Finally, there is no principled basis for creating a different state action standard for bar admissions boards than for boards of medical examiners, boards of professional plumbers or any other professional or occupational licensing boards.[21] *Bates v. State Bar of*

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[19] *See supra* note 13 and materials cited therein.

[20] In this context, it is noteworthy that the United States Department of Justice continues to investigate and prosecute anticompetitive restraints imposed by state professional licensing boards. *See, e.g., United States v. State Board of Certified Public Accountants of Louisiana*, Civ. No. 83-1947 (E.D. La. filed Apr. 15, 1983); *United States v. Alaska Board of Registration for Architects, Engineers and Land Surveyors*, No. A-82-423 CIF (D. Alaska filed Oct. 12, 1982).

[21] While petitioners have not raised a jurisdictional challenge under the decision in *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S. Ct. 1303 (1983), the National Conference of Bar Examiners and the State Bar of California, as *amici curiae*, made this argument in their briefs. However, the *Feldman* case does not provide a basis for denying jurisdiction in this case. Unlike the situation in *Feldman*, the complaint in this case attacks the grading system employed by the Arizona Committee on Examinations and Admissions. There is no basis for defining that grading system as a "judicial decision" as opposed to an administrative rule. In addition, the plaintiff in *Feldman* challenged a ruling of the highest court in the jurisdiction. To the contrary, this case involves a rule imposed by a subordinate board which was not authorized by the Arizona Supreme Court. Finally, it would not be reasonable to extend the *Feldman* rule to antitrust claims. Such a conclusion would result in a situation in which bar examiners, unlike the examiners of any other profession, are exempt from the proscriptions of the antitrust laws.

Arizona, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). As a result, the outcome of this case will decide whether all occupational licensing boards, not only bar examiners, will be required to obey the antitrust laws.

C. *The Alleged Anticompetitive Conduct Was Not Clearly Articulated And Affirmatively Expressed In State Bar Admissions Policy, Nor Was It Clearly Necessary To Effect The State Policy Regarding Bar Admissions Established By The Arizona Supreme Court.*

Applying the *Midcal* test to the conduct alleged in this case, it is clear that the Arizona Supreme Court has not established a clearly articulated and affirmatively expressed policy directing the Bar Examiners to establish a quota predicated on the need for additional members of the bar. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982). It is equally clear that adjusting the grades on an examination to limit artificially the number of persons admitted to a profession is not necessary to achieve the public purpose of ensuring a minimum level of competence. Although there is some dispute as to the precise mandate[22] of the Bar Examiners

[22] In his complaint, respondent asserted that the Arizona Supreme Court had adopted a rule that the passing grade on the bar examination would be 70. (J.A. 9). Despite the fact that the Bar Examiners admitted that particular allegation in their answer to the complaint (J.A. 17), their argument to the court of appeals relied upon an amended version of the rule granting them general authority to examine bar applicants, and the court of appeals relied upon the amended rule in reaching its decision that the Bar Examiners' conduct was not exempt. The original rule specified that "[a]ll applicants who receive a grade of seventy or more . . . shall be recommended for admission to the Bar." Respondent's Brief App. at 6-7. The amended rule provides that the Admissions Committee "shall examine applicants and recommend to this court for admission to practice applicants

in this case, it is quite evident that they cannot point to any rule which would make their conduct necessary to effectuate state competition policy regarding bar admissions. In short, it is impossible to conclude that the Arizona Supreme Court contemplated, or intended to authorize, the adoption of a grading system based on the board members' considerations of the need for additional lawyers rather than the academic qualifications of the applicants.[23]

Petitioners argue that since not all applicants are admitted, and the bar admissions process therefore necessarily restrains competition, the anticompetitive grading system allegedly employed by them is immune. However, as explained above, because all licensing procedures involve a certain degree of restraint, it is necessary to distinguish those restraints which are within

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who are found by the Committee to have the necessary qualifications." Brief for petitioners at 7. The parties have not previously directly addressed the question of which rule was in effect at the time of the February 1974 bar examination. In his brief on the merits, respondent argues that the subsequent rule could not have been effective at the time of the February 1974 examination because it was not adopted more than sixty days before the examination. *See* Ariz. Rev. Stat. Ann. § 12-109(c) (1982).

[23] It is not difficult to formulate the type of expression of state policy which would have been sufficient to immunize the conduct of the Arizona Committee on Examinations and Admissions. The *amici* states suggest that a rather specific statement of policy indicating that the Committee was authorized to determine the number of applicants to be admitted on the basis of competitive concerns or the need for additional lawyers in the state would be sufficient to immunize the type of conduct alleged in this case. For example, if the supreme court had authorized the Bar Examiners to determine the number of new lawyers they believed the market could absorb and to manipulate the exam grades accordingly, the alleged conduct would be protected. While such a court rule might raise very troubling policy concerns, it would presumably result in antitrust immunity.

the scope of the board's authority from those which exceed its authority. To conclude, as petitioners' argument would suggest, that because the bar examination process is inherently anticompetitive, any restraints they impose must be immune, would be to grant members of licensing boards virtually unlimited power to control competition within their profession. Members of professions sitting on state licensing boards would be able to limit artificially the number of practitioners competing against them, based solely on their assessment of market conditions. They would be free to restrict the form and place of practice or to impose other restrictions which limit competition. Board members, as competitors, would be the direct beneficiaries of these restraints and the public purpose of licensing would be eroded. Reversal of the court of appeals' judgment in this case would produce such a result.

The State Bar of California and the National Conference of Bar Examiners, in their *amicus curiae* briefs, have characterized the grading system used by the Arizona Bar Examiners to limit the number of bar admittees as "scaled scoring" which these *amici* claim is needed to ensure uniform qualifications among applicants. "Scaled scoring" is a grading system under which a statistical analysis of examination answers is performed to make an adjustment for variance in the relative difficulty of different tests. However, while a system of "scaled scoring" may be appropriately used on the multiple choice Multistate Bar Examination,[24] these *amici* have not argued that this system is necessary or appropriate with respect to the subjective grading of the essay part of the bar examination

[24] *Amici* states are willing to assume that a statistical analysis such as "scaled scoring" in connection with a multiple choice test may be consistent with a bona fide attempt to determine objectively the qualifications of applicants.

at issue here.[25] Indeed, given the subjective nature of any essay examination with different questions and different graders, a statistical analysis of such an examination must be far different and more complex than that used for a multiple choice examination.

In sum, the *amici* states believe that serious competitive concerns may be raised when bar examiners purport to adjust essay examination grades to reflect their subjective views as to the relative difficulty of different examinations. Said differently, the bar examiners could be using grade adjustments as a device for manipulating passing grades for competitive reasons rather than to ensure uniform qualifications.[26]

In order to maintain the integrity of occupational licensing and to ensure that those entrusted by states with the responsibility of performing the occupational licensing function adhere to the public interest goals set out for them, anticompetitive regulation by occupational licensing boards must be scrutinized carefully. The mere existence of a system of occupational licensing should not serve to immunize any and all anticompetitive conduct by an occupational licensing board. The specific authorization for anticompetitive conduct which is necessary in order to immunize the acts of a state board is absent in this case.

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[25] One expert on bar examinations stated that he was not aware of any state which attempted to "equalize" the grades on its essay examination. Medlinsky, *Remarks*, in 49 Bar Examiner 59, 65 (1980).

[26] Because of the procedural posture of this case, very little factual analysis is possible. Details with respect to the use of "scaled scoring" or the precise methodology used by the Bar Examiners must, therefore, be reserved for a later stage of this litigation.

III. Applying The Antitrust Laws To This Case Will Not Impose Undue Burdens On State Bar Admissions Procedures.

The Bar Examiners and the two *amici* which have submitted briefs on their behalf have argued that denial of the state action exemption in this case would lead to a proliferation of antitrust claims against bar examiners, thereby interfering with the bar examination process, and unduly burdening the federal courts.[27] To the contrary, this case would not inevitably require that individual

[27] As *amici* states have pointed out, the denial of the state action exemption in this case would require all occupational licensing boards to obey the antitrust laws.

In addition to raising the question of the standard to be applied in scrutinizing the conduct of occupational licensing boards, this case also presents the difficult question of whether individual board members may be subject to individual antitrust liability. While it is somewhat troubling to conclude that individuals who serve on state boards as volunteers may be liable for damages under the antitrust laws, there is clearly precedent for such individual liability of government officials under the civil rights laws. The Court has developed a standard of "qualified immunity" for government officials in the civil rights area, but has consistently refused to extend absolute immunity on the basis of official status. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Wood v. Strickland*, 420 U.S. 308 (1975).

The same rationale supports the conclusion that state and local government officials may be individually liable for antitrust violations. In the area of trade regulation, the antitrust laws embody fundamental principles of free competition much as principles of individual liberties are embodied in the civil rights laws. Both the antitrust laws and the civil rights laws protect interests regarded as crucial to our system of government. Consequently, a compelling argument can be made that the same standards which determine the liability of officials for civil rights violations should be applied to officials who violate the antitrust laws. In developing those standards, the Court has accommodated the competing interests of immunizing government officials for conduct undertaken in their official capacity and of protecting fundamental national interests. This result is especially appropriate where personal as opposed to public motives can be attributed to the public officials' conduct.

grading decisions be reconsidered by federal courts. Rather, the decision below requires only that grading systems which incorporate admissions barriers not authorized by the state's policymakers are not exempt. Clearly, such unwarranted trade restraints are proper subjects for federal court consideration.

More importantly, petitioners' argument that avoidance of a proliferation of litigation justifies immunity must fail because it ignores the importance Congress has placed upon our national policy favoring free competition. In sum, this Court's answer to the same argument raised by political subdivisions in *Boulder* provides the most appropriate response:

> [T]his argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities. Moreover, judicial enforcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *City of Lafayette*, 435 U.S. at 416.

455 U.S. at 56-57 (footnotes omitted).

The Fifth Circuit Court of Appeals has recently granted rehearing of a decision which adopted this position and held the mayor of Houston individually liable for treble damages under the antitrust laws. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir.), *reh'g granted*, 1983-2 Trade Cas. (CCH) ¶65,597 (5th Cir. 1983).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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